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ISN'T THAT SPECIAL?: THE EPA'S SPECIAL-CASE DETERMINATION FOR THE LOS ANGELES RIVER EXTENDS CLEAN WATER ACT PROTECTIONS CAST IN DOUBT BY THE ARMY CORPS AND THE UNITED STATES SUPREME COURT

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ARTICLE

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I. INTRODUCTION

The Los Angeles River (the LA River or River) has had a long, tenuous relationship with the Clean Water Act, the nation's preeminent water quality law. The Act protects traditionally navigable waters and their tributaries from pollution.[1] In early 2008, the United States Army Corps of Engineers (Army Corps) determined that only two short segments of the Los Angeles River warranted Clean Water Act protection.[2] Covering a total of just 3.75 of the River's 51 miles,[3] this

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[1] *See* Clean Water Act, 33 U.S.C.A. §§ 1311(a), 1341, 1342(a), 1344(a) (Westlaw 2011).

[2] Memorandum for Aaron O. Allen, Chief, North Coast Regulatory Division, U.S. Army

determination left most of the River outside of the Clean Water Act's jurisdictional province.

Responding to the outrage of citizens and environmental groups who feared the Army Corps' determination stripped the River's Clean Water Act protection,[4] the United States Environmental Protection Agency (EPA) declared the Los Angeles River a "special case" and took jurisdiction over the navigability determination in August 2008.[5] Two years later, in July 2010, the EPA deemed all fifty-one miles of the River a traditionally navigable waterway, restoring Clean Water Act protection to the River and its tributaries, which interlace its densely populated, 830-square-mile watershed.[6] This determination, widely celebrated by the environmental community, will have profound implications for growth, recreation, and planning in Southern California.

A special-case determination occurs when the EPA asserts jurisdiction to overrule an Army Corps' factual determination,[7] such as the geographic extent of a waterway of the United States. Until recently, EPA special-case determinations were rare and relatively noncontroversial. Indeed, only seven special determinations have been documented to date.[8] Notably, several of the EPA's recent special-case

Corps of Eng'rs 4 (Mar. 20, 2008) [hereinafter Army Corps' LA River TNW Determination] (finding that only the LA River estuary up to Highway 1 is a TNW), *available at* www.h2ohno.com/images/TNW_Status_March_20_of_2008.pdf; Memorandum for the Record Concerning U.S. Army Corps of Eng'rs Determination of Traditional Navigable Waters on the Los Angeles River, (June 4, 2008) [hereinafter Army Corps' Amended TNW Determination] (amending its Mar. 20, 2008, TNW determination to find that the Sepulveda Basin, an upstream section of the River, is also a TNW).

[3] *See* Amended TNW Determination, *supra* note 2.

[4] *See, e.g.*, Letter from Tatiana Gaur, Staff Attorney, Santa Monica Baykeeper, et al., to David Smith, Chief, Wetlands Regulatory Office, EPA Region 9, at 1-2 (Mar. 20, 2009), *available at* http://acmela.org/images/EPA_Special_Case_Group_Letter_with_ACME_and_cleanuprocketdyne_dot_org.pdf.

[5] Letter from Jared Blumenfeld, Administrator, EPA Region IX, to Colonel Mark Toy, District Engineer, Los Angeles District, United States Army Corps of Eng'rs (Aug. 17, 2008) (transmitting Clean Water Act jurisdictional determination for the Los Angeles River), *available at* www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf.

[6] U.S. ENVTL. PROT. AGENCY, REGION 9, SPECIAL CASE EVALUATION REGARDING STATUS OF THE LOS ANGELES RIVER, CALIFORNIA, AS A TRADITIONAL NAVIGABLE WATER 4 (2010) [hereinafter LA RIVER SPECIAL-CASE EVALUATION], *available at* www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf.

[7] Memorandum of Agreement Between the Dep't of the Army and the EPA Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(F) of the Clean Water Act (Jan. 19, 1989) [hereinafter Memorandum of Agreement], *available at* http://water.epa.gov/lawsregs/guidance/wetlands/404f.cfm.

[8] The authors unearthed only seven special-case determinations during several months of research, including e-mail and telephone communications with each EPA regional office. *See* Memorandum from John Dixon, Ecologist, Cal. Coastal Comm'n Regarding Natural Resources at

determinations have confirmed or restored Clean Water Act protections to waterways placed in doubt by the Supreme Court's decision in *Rapanos v. United States*, which limited applicability of the Clean Water Act to traditionally navigable waterways (TNWs) and to waterways and wetlands with a significant nexus to traditionally navigable waterways.[9] The EPA's foray into the Los Angeles River navigability determination may suggest a new agency priority – restoration of Clean Water Act protections to pre-*Rapanos* levels using executive branch authority to expand judicially imposed limitations.

The protective impacts of the EPA's newfound willingness to assert jurisdiction are already being felt by U.S. bodies of water, as demonstrated by the January 2011 revocation of a mountaintop mining permit that would have buried streams in West Virginia,[10] and the February 2011 EPA proposal to assert jurisdiction over development near the Santa Clara River at Newhall Ranch.[11] The EPA's special-case determination authority has the potential to dramatically increase the number and extent of national waters protected by the Clean Water Act.

In an effort to examine the implications EPA's ability to extend Clean Water Act protection through the use of its special-case determination authority, this Article provides a case study of the Los Angeles River and the regulatory interplay between the Army Corps and the EPA. To begin, Part I sets forth the factual background of the LA River, describing its fickle and often volatile physical nature. It then describes the legal framework underlying the case by providing an overview of the Clean Water Act, its shared administration by the EPA

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the Parkside Property 5 (July 2, 2007), *available at* http://documents.coastal.ca.gov/reports/2007/7/W8.5a-7-2007-a8.pdf; LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 3; Letter from Benjamin H. Grumbles, Assistant Adm'r, U.S. EPA, Region 9, to John Paul Woodley, Jr., Assistant Sec'y of the Army (Civil Works), Dep't of the Army (Dec. 3, 2008), *available at* www.spl.usace.army.mil/regulatory/SantaCruzRiver_TNW_EPAletter.pdf; EARTHJUSTICE ET AL., COURTING DISASTER: HOW THE SUPREME COURT HAS BROKEN THE CLEAN WATER ACT AND WHY CONGRESS MUST FIX IT 26 (2009) [hereinafter COURTING DISASTER], *available at* www.cleanwateraction.org/files/publications/national/CourtingDisaster-200904.pdf; Memorandum for the Record from Jane M. Kenny, Administrator, EPA Region 2, 1 (Nov. 22, 2002) (concerning Special-Case Designation for 2220 Wehrle Drive Site), *available at* www.epa.gov/region02/water/wetlands/wehrle_drive.pdf.

[9] Rapanos v. United States, 547 U.S. 715 (2006).

[10] Press Release, EPA, EPA Halts Disposal of Mining Waste to Appalachian Waters at Proposed Spruce Mine (Jan. 13, 2011), *available at* http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/6b9ecfafebce79a5852578170056a179!OpenDocument; *see also* Final Determination for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No.1 Mine, Logan County, WV, 76 Fed. Reg. 3126-01 (Jan. 19, 2011).

[11] Louis Sahagun, *EPA, Army Corps of Engineers Are at Odds over Newhall Ranch*, L.A. TIMES, Feb. 3, 2011, *available at* http://articles.latimes.com/2011/feb/03/local/la-me-adv-newhall-epa-20110202.

and Army Corps, and the basis for the EPA's special-case authority. Part II then discusses the Army Corps' initial TNW determination and the EPA's subsequent application of its special authority to overrule the Army Corps' determination, while highlighting the agencies' differing treatment and characterization of evidence used in making the determination. Finally, Part III discusses the potentially far-reaching consequences of the River's navigability determination within the context of Southern California.

II. THE FACTUAL AND LEGAL BACKGROUND OF EPA'S SPECIAL-CASE DETERMINATION

A. THE LOS ANGELES RIVER IS UNIQUE AMONG WORLD RIVERS

The Los Angeles River runs fifty-one miles from its origin in the northeastern San Fernando Valley to its mouth at the Pacific Ocean in Long Beach.[12] Officially beginning at the confluence of Bell Creek and Arroyo Calabasas in Canoga Park, the River flows east through the valley and curves sharply around Griffith Park near Glendale, before heading southeast toward Dodger Stadium and Elysian Park. From there, the River runs almost directly south through the downtown business district, hugging the Interstate 710 highway until emptying into the Pacific Ocean near the Port of Long Beach. The River drains 834 square miles of heavily populated watershed[13] and flows through sixteen cities.[14]

Almost defying characterization, even the pre-Spanish era Los Angeles River never resembled the stereotypical wide and ever-flowing river with defined banks. Until channelization in the early twentieth century,[15] the Los Angeles River had no permanent route and impulsively carved new stream channels during storms.[16] During periods of high rain, the River enveloped the Los Angeles Basin with a maze of wetlands, impassable jungle, and vast inland seas.[17] Increasing numbers

[12] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 4.

[13] Cnty. of Los Angeles, Dep't of Public Works, *Los Angeles River Watershed*, http://dpw.lacounty.gov/wmd/watershed/LA/ (last visited Apr. 25, 2011).

[14] Cnty. of Los Angeles, Dep't of Public Works, *Map of Los Angeles River Watershed*, http://dpw.lacounty.gov/wmd/watershed/LA/Map.cfm (last visited Apr. 25, 2011).

[15] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 8.

[16] Cnty. of Los Angeles, Dep't of Public Works, *History of the Los Angeles River* [hereinafter *History of the LA River*], http://dpw.lacounty.gov/wmd/watershed/LA/History.cfm (last visited Apr. 25, 2011).

[17] BLAKE GUMPRECHT, THE LOS ANGELES RIVER: ITS LIFE, DEATH, AND POSSIBLE REBIRTH

of artificial diversions eliminated the lush bottomlands by the turn of the last century,[18] but devastating flooding continued through much of the 1900s.[19]

Catastrophic flooding was commonplace in wet years. In 1884, a traveler writing to an Ohio newspaper reported:

> The Los Angeles is one of those streams whose bed, at some points, is above the water. In other words, it flows underground, or is lost in the sand. During the rainy season it enlarges to a broad river, with a powerful current and a dangerous shifting bottom. Widely overflowing its banks, it sweeps away real estate and personal property in a most merciless fashion. Scarcely a season passes in which adventurous men do not lose their lives in attempting to cross it with teams when at its flood.[20]

While the Los Angeles basin typically receives no more than fifteen inches of rain per year, this rain typically falls between November and March, and sometimes in a matter of days.[21] Precipitation rates can exceed two inches per hour.[22] The watershed's higher elevations frequently receive double and triple the amount of rain that falls in the basin, with some peaks in the San Gabriel Mountains receiving more than forty inches of rain annually.[23] The force of this flow is compounded by the River's sudden drop to the sea: the River's main channel declines 795 feet in elevation on its journey from its highest source to its mouth fifty-one miles away.[24] The Mississippi River, by contrast, falls only 605 feet in elevation along its 2,000-mile length.[25] Impacts of extreme rain events in the watershed are further exacerbated by debris flows originating in the San Gabriel Mountains, among the most erodible mountains on earth.[26]

9, 16-20 (2001).

[18] *Id*. at 19-20.

[19] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 6.

[20] EMMA H. ADAMS, TO AND FRO IN SOUTHERN CALIFORNIA WITH SKETCHES IN ARIZONA AND NEW MEXICO 67-68 (1887) (quoted in GUMPRECHT, *supra* note 17, at 13).

[21] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 6.

[22] GUMPRECHT, *supra* note 17, at 14-15.

[23] *History of the LA River*, *supra* note 16; LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 8.

[24] CITY OF LOS ANGELES, *The Los Angeles River*, www.ci.la.ca.us/san/wpd/siteorg/general/lariver/lariver.htm (last visited Apr. 25, 2011).

[25] GUMPRECHT, *supra* note 17, at 132.

[26] DEP'T OF PUBLIC WORKS ET AL., CNTY. OF LOS ANGELES, *Los Angeles River Master Plan* 5-48 to 5-51 (1996), [hereinafter *LA River Master Plan*], *available at* http://dpw.lacounty.gov/wmd/watershed/LA/LARMP.

Combined, these factors place the Southern California metropolitan area at risk of catastrophic flooding.[27] Indeed, Southern California has experienced more than sixty significant floods since Spanish settlement in 1781.[28]

Pursuant to the Flood Control Act of 1936, all but 12.3 miles of the Los Angeles River were encased in a massive concrete channel, primarily between the late 1930s and the 1950s.[29] In all, approximately 370 miles of concrete were applied to the tributaries and upstream sources of the Los Angeles River.[30] In many cases, these concrete drainage ditches consolidated and entirely replaced natural features.

The River's nomenclature is telling. For the purposes of public agencies that deal with it, the River has become the "Los Angeles River Flood Control Channel," one of the largest and most efficient water conveyance systems on earth. The system is managed under a complex set of relationships between the Army Corps, Los Angeles County, and the City of Los Angeles.[31] Because of channelization, water entering the watershed can be discharged to the Pacific Ocean in little more than an hour; speeds in the main channels sometimes exceed forty-five mph during storms.[32]

Despite a century of engineering by the City and County of Los Angeles, and by the Army Corps, the Los Angeles River remains atypical. Drained of its aquifer sources for municipal use, and encased in a trapezoidal concrete channel for most of its length, the River now depends primarily on the Donald C. Tillman water reclamation plant for its dry weather flow.[33] Businesses and homes line its banks, detached from the River by chain-link and barbed-wire fences. Nearly all of the

[27] Cnty. of Los Angeles, Chief Exec. Office, *Historical Disaster Information*, http://lacoa.org/historicalinfo.htm (last visited Apr. 25, 2011); GUMPRECHT, *supra* 17, at 131.

[28] GUMPRECHT, *supra* note 17, at 131.

[29] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 8-9.

[30] GUMPRECHT, *supra* note 17, at 227, 232.

[31] CITY OF LOS ANGELES, FINDINGS AND STATEMENT OF OVERRIDING CONSIDERATIONS, LOS ANGELES RIVER REVITALIZATION MASTER PLAN 13-14 (2007), *available at* www.lariverrmp.org/eireis/pdf/LARRMP_Findings_and_Statement_of_Overriding_Considerations_April_2007.pdf.

[32] Friends of the L.A. River, *River Revival: Navigating the Power of the Clean Water Act*, RIVER NETWORK, www.rivernetwork.org/resource-library/river-revival-navigating-power-clean-water-act (last visited Apr. 25, 2011); *see also* GUMPRECHT, *supra* note 17, at 224.

[33] CITY OF LOS ANGELES, DEP'T OF PUBLIC WORKS, DONALD C. TILLMAN WATER RECLAMATION PLANT (showing discharge of minimum of 20 mgd into the River), *available at* www.ci.la.ca.us/SAN/lasewers/treatment_plants/tillman/flowchart/flowchart.htm (last visited Apr. 4, 2011); LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 6 (showing discharge of up to 80 mgd into the LA River).

wetlands are gone.[34]

Although the main channel is better known for the race scene in the movie *Grease* than for the narrow ribbon of tertiary-treated effluent running through it, several sections of the Los Angeles River avoided channelization. In areas such as the Glendale Narrows, Compton Creek, and the Sepulveda Basin, birds and wildlife are plentiful.[35] Interestingly, the natural features of the Sepulveda Basin were actually created by the Army Corps during the construction of Sepulveda Dam.[36] In these sections and others, activities such as bird-watching, kayaking, and fishing are common. A local activist said:

> You see cinnamon teal, which are marsh ducks, in the L.A. River because there are no more marshes . . . . Last year we did about 25 samples of fish in the river – there's a lot more fish than most people would have imagined, carp a foot and a half long, all through the Glendale [N]arrows. . . . You see families fishing a lot.[37]

Application of the Clean Water Act to the Los Angeles River is complicated by the river's inherent unpredictability. Southern California's erratic year-to-year total rainfall and frequent droughts cause the river and its tributaries to oscillate between dry washes and raging torrents.[38] This unpredictability prevents easy characterization of the River and has caused continuing disagreements over whether the River is navigable and therefore protected by the Clean Water Act.

Unlike more traditional rivers fed by permanent streams or reliable mountain snowpack, the Los Angeles River's only natural water source falls as rain or snow in the San Gabriel, Verdugo, Santa Monica, and Santa Susana mountains, and in urban areas below the mountains.[39] Rain enters the River either slowly and indirectly from underground aquifers or directly as torrents of rainfall and mountain runoff.[40]

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[34] CITY OF LOS ANGELES & U.S. ARMY CORPS OF ENG'RS, FINAL PROGRAMMATIC ENVTL. IMPACT REPORT/PROGRAMMATIC ENVTL. IMPACT STATEMENT FOR THE LOS ANGELES RIVER REVITALIZATION MASTER PLAN 3-40 (2007), *available at* www.lariver.org/5.1b_ download_publications_PEIR.htm.

[35] *LA River Master Plan*, *supra* note 26, at 5-48 to 5-51; LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 9-10, 13; GUMPRECHT, *supra* note 17, at 235, 238.

[36] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 10.

[37] Pat Morrison, *Lewis MacAdams: The L.A. River's Best Friend*, L.A. TIMES, Aug. 6, 2010, *available at* http://articles.latimes.com/print/2010/aug/06/opinion/la-oe-morrison-macadams-20100 802.

[38] *LA River Master Plan*, supra note 26, at 2-3.

[39] *See* Morrison, *supra* note 37.

[40] *LA River Master Plan*, *supra* note 26, at 1, 4; *History of the LA River*, *supra* note 16; GUMPRECHT, *supra* note 17, at 13.

It is this direct and sporadically heavy rainfall that sentenced the River to its concrete confinement. The Los Angeles River's largest tributaries include the Arroyo Seco, Big Tujunga Wash, Aliso Canyon Wash, Browns Canyon Wash, Aliso Canyon Wash, the Rio Hondo, and Compton Creek.[41] Only the Rio Hondo and Compton Creek provide reliable year-round flow.[42] The remaining tributaries, which contribute most of the River's total flows, are best characterized as dry washes except during and after rains.[43]

Most of the year, the River is only a trickle of urban runoff and reclaimed water, but during storm events it can exceed the flow of the mighty Mississippi River.[44] Because of these dramatic shifts, the Supreme Court has struggled to apply the Clean Water Act to the River.[45] Justice Kennedy's dissent in *Rapanos* demonstrates the inherent difficulty:

> The plurality's first requirement — permanent standing water or continuous flow, at least for a period of "some months," . . . — makes little practical sense in a statute concerned with downstream water quality. The merest trickle, if continuous, would count as a "water" subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not. . . . The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. Yet it periodically releases water volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles.[46]

Public perception of the River has rebounded considerably since its historic low: a 1989 proposal by a state assembly member to convert the waterway into a freeway, presumably because there was so much concrete already in place.[47] That proposal spawned the growth of community groups such as Friends of the Los Angeles River, which have

[41] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 6.

[42] LOS ANGELES & SAN GABRIEL RIVERS WATERSHED COUNCIL, COMPTON CREEK WATERSHED MANAGEMENT PLAN 127 (2005), *available at* www.lasgrwc.org/ComptonCreek/Documents/Watershed%20Management%20Plan/06%20Ch%205%20Watershed%20Management%20Strategies.pdf.

[43] GUMPRECHT, *supra* note 17, at 15; *LA River Master Plan*, *supra* note 26, at 3-4.

[44] GUMPRECHT, *supra* note 17, at 216.

[45] Rapanos v. United States, 547 U.S. 715 (2006).

[46] *Id*. at 769 (Kennedy, J., concurring) (citations omitted).

[47] Richard Katz, Opinion, *What's So Silly About a Bargain Freeway*, L.A. TIMES, Sept. 8, 1989, *available at* http://articles.latimes.com/print/1989-09-08/local/me-1672_1_los-angeles-river.

advocated for the River's reintegration into city life.[48]

B. THE CLEAN WATER ACT PROTECTS THE QUALITY OF WATERS OF THE UNITED STATES: THE LEGAL FRAMEWORK FOR THE EPA'S LOS ANGELES RIVER SPECIAL-CASE DETERMINATION

i. Although the EPA and Army Corps Share Jurisdiction over the Clean Water Act, the EPA Retains Overriding Authority

In 1972, Congress enacted the Clean Water Act[49] with its stated goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[50] To this end, the statute prohibits the discharge of any pollutant, including dredged or fill material into "navigable waters," except in compliance with the Act.[51] The "discharge of any pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."[52] The Clean Water Act gives overall implementation authority to the EPA.[53]

The Clean Water Act provides two exceptions to the pollutant discharge prohibition, whereby the EPA and the Army Corps may issue permits for discharging into navigable waters.[54] First, pursuant to section 402 of the Act, the EPA regulates "pollutant" discharges into navigable waters under the National Pollution Discharge Elimination System permit program.[55] Permits issued under this program limit the amount of pollution a permittee may discharge, ensuring that state-set water quality standards are maintained.[56] Second, the Army Corps has authority under section 404 of the Act to issue permits for discharging "dredge and fill" material into navigable waters.[57] Under these dual permitting programs, each agency has authority to determine whether a water body falls within its Clean Water Act regulatory jurisdiction.

Because the Clean Water Act applies only to navigable waters, the

[48] Friends of the Los Angeles River, *River History*, http://folar.org/?page_id=16 (last visited Apr. 26, 2011).

[49] Clean Water Act, 33 U.S.C.A. § 1251 (Westlaw 2011).

[50] 33 U.S.C.A. § 1251(a).

[51] 33 U.S.C.A. §§ 1311(a), 1362(12)(A).

[52] 33 U.S.C.A. § 1362(12)(A).

[53] 33 U.S.C.A. § 1251(d).

[54] 33 U.S.C.A. §§ 1342, 1344.

[55] 33 U.S.C.A. § 1342.

[56] 33 U.S.C.A. §§ 1311, 1313.

[57] 33 U.S.C.A. § 1344.

EPA and Army Corps must first determine whether a water body is navigable before enforcing the permitting programs of sections 402 and 404. The Clean Water Act broadly defines "navigable waters" as "the waters of the United States, including the territorial seas."[58] The EPA and Army Corps' regulations expansively define "waters of the United States" to include all interstate waters such as lakes, streams, and wetlands; waters that are or have been used for interstate commerce; and tributaries of these waters, the destruction or degradation of which could affect interstate commerce.[59] Mudflats, sandflats, sloughs, and prairie potholes are also protected by the regulations.[60]

Generally, each agency makes its own "jurisdictional determination," a finding of whether the water body in question falls within its jurisdiction.[61] The EPA makes the jurisdictional determination for section 402 pollution discharge purposes, while the Army Corps makes the initial jurisdictional determination under the section 404 dredge and fill permit program. Even so, the EPA possesses overarching authority to enforce the entire Clean Water Act,[62] and in particular circumstances, the EPA can overrule the Army Corps' initial determination.[63]

In 1979, the U.S. Attorney General issued an opinion stating that the EPA Administrator has ultimate authority under the Clean Water Act to determine which water bodies fall within the jurisdictional scope of the Act and when exceptions apply.[64] A decade later, the EPA and the Department of the Army entered into a Memorandum of Agreement (MOA), "[c]oncerning the [d]etermination of the [g]eographic [j]urisdiction of the [s]ection 404 [p]rogram," which established the policies and procedures for both agencies to follow in making jurisdictional determinations.[65] Pursuant to the MOA, the Army Corps performs the initial jurisdictional determination, albeit in adherence with established EPA guidance and regulations. Meanwhile, the EPA, being the lead Clean Water Act agency, has final authority over jurisdictional determinations should the agencies disagree.[66]

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[58] 33 U.S.C.A. § 1362(7).

[59] 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2.

[60] 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2.

[61] 33 U.S.C.A. §§ 1342, 1344 (Westlaw 2011).

[62] 33 U.S.C.A. § 1251(d).

[63] Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. 197 (1979).

[64] *Id*.

[65] Memorandum of Agreement, *supra* note 7.

[66] Memorandum of Agreement, *supra* note 7.

If the EPA disagrees with an Army Corps' navigability determination, section 404 of the Clean Water Act grants the EPA authority to designate the area a "special case" and make the final determination.[67] This enables the EPA to have ultimate power to protect water bodies that otherwise would not be protected.

The authors have uncovered only seven instances in which the EPA has actually exercised its special-case authority. These seven designations are as follows: the Southern California Bolsa Chica wetlands in 1980;[68] the Los Angeles River in July 2010;[69] the Santa Cruz River in Arizona in August 2008;[70] three first-order ephemeral streams and waters used for commercial recreational navigation sites in the Kansas City District in February 2008;[71] and a site in Amherst, New York, in 2002.[72] That five of these seven special-case determinations occurred within the past three years suggests a trend within the EPA in favor of expanding Clean Water Act protections to more water bodies.

ii. U.S. Supreme Court Narrows the Scope of Clean Water Act Coverage

In its first opportunity to interpret the scope of Clean Water Act protections, the U.S. Supreme Court, in *United States v. Riverside Bayview Homes, Inc.*, endorsed the Army Corps' broad interpretation of the Act.[73] However, in subsequent decisions, the Court narrowed the breadth of the Clean Water Act and issued plurality decisions that offered conflicting guidance on how to interpret some the Act's key terms.

a. *United States v. Riverside* Endorses a Broad Interpretation of the Scope of the Clean Water Act

The Supreme Court upheld the EPA and Army Corps regulations' expansive definition of "waters of the United States" in *United States v. Riverside Bayview Homes, Inc.*, when it upheld an Army Corps action

[67] 33 U.S.C.A. § 1344 (Westlaw 2011). Special Cases may be designated on a project-specific basis or generic basis. *See id.*

[68] Dixon, *supra* note 8, at 5.

[69] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 3.

[70] Grumbles, *supra* note 8.

[71] COURTING DISASTER, *supra* note 8, at 1.

[72] Kenny, *supra* note 8, at 1.

[73] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

enjoining a landowner from filling in a marsh adjacent to a lake.[74] In this 1985 decision, Justice White reasoned that the breadth of Congress's concern for water quality and aquatic ecosystems contained in the language of the Clean Water Act compelled a broad reading of the term "navigable waters."[75] Thus, it was reasonable for the Army Corps to exercise jurisdiction over wetlands, even those not constantly inundated or dominated by aquatic plants.

However, after initially endorsing the Army Corps' broad interpretation of the scope of Clean Water Act protections in *Riverside*,[76] the Court's subsequent decisions narrowed the Act's applicability. In two complex decisions, the Supreme Court tackled the issue of how to determine which water bodies are traditionally navigable and thus subject to the Act's jurisdiction, and which fall outside its protections. These decisions are viewed by environmental groups as having, "shattered the fundamental framework of the Clean Water Act."[77]

b. *SWANCC* Limits *Riverside* to Wetlands Having a Significant Nexus with Navigable Waters

In 1986, the Army Corps defined "waters of the United States" to include intrastate waters that are or would be used as habitat by migratory birds that cross state lines.[78] This "Migratory Bird Rule" became the subject of a judicial challenge that fundamentally redefined the concept of the waters of the United States. In 2001, the Supreme Court decided *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).[79] In *SWANCC*, a local waste agency challenged the Migratory Bird Rule as exceeding congressional authority.[80] The Army Corps argued that the rule fell within Congress's power under the Commerce Clause because billions of dollars are spent annually on recreational migratory bird-watching, so the protection of migratory bird habitat substantially affects interstate commerce.[81] The Supreme Court rejected the Army Corps' interpretation of the Clean Water Act, agreeing with the waste agency that the Migratory Bird Rule

[74] *Id.*
[75] *Id*.
[76] *Id.*
[77] COURTING DISASTER, *supra* note 8, at 1.
[78] Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162 (2001).
[79] *Id*.
[80] *Id*.
[81] *Id*. at 165-66.

exceeded congressional authority.[82] The Court acknowledged that in *Riverside* it decided the term "navigable" was of "limited import," and Congress intended to regulate some waters that would not be considered "navigable" under the classical understanding of the term.[83] Nonetheless, the Court held Congress intended to require at least a "significant nexus" to a navigable waterway for regulation under the Clean Water Act. Therefore, the *SWANCC* Court limited Clean Water Act applicability, determining the regulated water need be adjacent to, possess a continuous surface connection to, or be "inseparably bound up" with a navigable waterway.[84]

c. *Rapanos* Further Limits the Clean Water Act to Wetlands Having a Continuous Surface Connection to Waters of the United States

In *Rapanos*,[85] the Court addressed whether wetlands that lie near ditches or man-made drains that eventually empty into traditional navigable waters are "waters of the United States."[86] The justices issued five separate opinions – one plurality opinion authored by Justice Scalia, two concurring opinions authored by Justice Kennedy and Chief Justice Roberts, and two dissenting opinions.[87] The plurality held the Army Corps' regulatory authority extends only to relatively permanent, standing, or continuously flowing bodies of water forming geographic features described in ordinary parlance as streams, oceans, rivers, and lakes.[88] The plurality determined that authority does not extend to channels through which water flows intermittently or ephemerally, or to channels that periodically provide drainage for rainfall.[89] Justice Kennedy concurred with the plurality's judgment but put forth a different standard for determining Clean Water Act jurisdiction – the "significant nexus" standard relied upon in *SWANCC*. Justice Kennedy concluded wetlands are waters of the United States if they:

> either alone, or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as

[82] *Id*. at.168.
[83] *Id*, at 167.
[84] *Id*.
[85] Rapanos v. United States, 547 U.S. 715 (2006).
[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] *Id*. at 739-42.

> "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[90]

Given the lack of a majority opinion, federal courts of appeals disagree on whether the Scalia or Kennedy standard is the appropriate test for jurisdictional determinations.[91] Thus, the *Rapanos* decision has provided little clarity for determining whether areas such as the Los Angeles River are subject to federal Clean Water Act jurisdiction.

d. The EPA and Army Corps' *Rapanos* Guidance Document Interprets the Current Extent of Federal Jurisdiction

After the *Rapanos* and *SWANCC* decisions narrowed the definition of waters of the United States, non-navigable isolated water bodies like prairie pothole wetlands, playa lakes, vernal pools, and a number of other waters lost the protection of the Clean Water Act.[92] These water bodies are invaluable for wildlife habitat, groundwater recharge, and flood protection.[93] Additionally, tributaries of larger waters of the United States, and their adjacent wetlands, lost their categorical protection. [94] By this standard, only relatively permanent tributaries or tributaries with a "significant nexus" to traditionally navigable waters are protected.[95] Given that approximately 20 percent of the more than 100 million acres of wetlands in the continental United States are geographically "isolated," and 60 percent of stream miles are not considered "relatively permanent," these interpretations left a tremendous number of water bodies unprotected by the Clean Water Act.[96]

In 2008, the EPA and Army Corps issued a joint guidance document entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (*Rapanos* Guidance)."[97] The *Rapanos* Guidance document was

[90] *Id*. at 780.

[91] Stephen P. Louthan, *Post-"Rapanos" Rulings*, NAT'L L.J., Sept. 25, 2006, *available at* www.cobar.org/docs/PostRapanosRulings.pdf?ID=2947; THE SUPREME COURT AND THE CLEAN WATER ACT : FIVE ESSAYS, (L. Kinvin Wroth ed., 2007), *available at* www.vjel.org/books/pdf/PUBS10004.pdf.

[92] COURTING DISASTER, *supra* note 8, at 1.

[93] *Id*.

[94] *Id*. at 3.

[95] *Id*.

[96] *Id*.

[97] Memorandum from the U.S. Army Corps of Eng'rs and U.S. Envtl. Prot. Agency on Clean Water Act Jurisdiction following *Rapanos v. United States*, (Dec. 2, 2008) [hereinafter *Rapanos*

created to assist the EPA and the Army Corps with jurisdictional determinations under Clean Water Act section 404 in light of recent Supreme Court decisions.[98] The *Rapanos* Guidance provides assistance to agencies assessing traditional navigable waters, adjacent wetlands, relatively permanent non-navigable waterways and their wetlands, and wetlands with a significant nexus to traditional navigable waterways.[99] The *Rapanos* Guidance states that TNWs include all waters currently in use, those used in the past, and those susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide.[100] With regard to non-navigable, relatively impermanent tributaries and their adjacent wetlands, jurisdiction exists where such tributaries have a "significant nexus" with a TNW.[101] The finding of a significant nexus requires a fact-specific analysis that includes assessment of flow characteristics and functions of the tributary itself, as well as the functions performed by adjacent wetlands, to determine if they significantly affect the chemical, physical, and biological integrity of downstream TNWs.[102]

In 2007, Congress also responded to the *SWANCC* and *Rapanos* decisions by introducing the Clean Water Restoration Act (CWRA),[103] which would have removed the term "navigable" from the Clean Water Act.[104] Congress attempted to replace it with "waters of the United States," which would have included (1) all waters that are subject to the ebb and flow of the tide; (2) all interstate waters, including interstate wetlands; (3) all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds; (4) all impoundments of waters of the United States; (5) tributaries of the aforementioned waters; (6) the territorial seas; and (7) wetlands adjacent

Guidance], *available at* www.epa.gov/owow/wetlands/pdf/CWA Jurisdiction_Following_Rapanos 120208.pdf. The *Carabell* case was consolidated with *Rapanos* for purposes of argument and decision. Whereas in *Rapanos*, the government initiated enforcement proceedings against parties who allegedly backfilled wetlands without a permit, in *Carabell*, the Court reversed the Sixth Circuit's decision denying landowners a permit to fill wetlands separated from a drainage ditch by an impermeable berm due to the lack of continuous surface connection between the wetland and ditch. Rapanos v. United States, 547 U.S. 715 (2006), *rev'g* United States v. Carabell, 391 F.3d 704 (6th Cir. 2004)).

[98] *Rapanos* Guidance, *supra* note 97, at 1.

[99] *Id*.

[100] *Id*.

[101] *Id*.

[102] *Id*.

[103] Clean Water Restoration Act of 2007, S. 1870, 110th Cong. (2007); H.R. 2421, 110th Cong. (2007).

[104] *Id*.

to the aforementioned waters.[105] Thus, the CWRA would have reinstated protection for many of the nation's waterways. However, as of the date of this writing, Congress has not brought it to a vote.[106] Therefore, a water body's status as a TNW remains the key factor in determining whether it, and its tributaries, are protected under the Clean Water Act.

III. THE ARMY CORPS AND EPA REACHED STRIKINGLY DIFFERENT CONCLUSIONS WITH REGARD TO FEDERAL JURISDICTION OVER THE LOS ANGELES RIVER

The Los Angeles River navigability determinations made by the Army Corps and EPA, both purportedly in accordance with the *Rapanos* Guidance, provide a remarkable study in contrast. Both agencies considered the River's physical characteristics, including flow and depth, the history of navigation by watercraft on the River, its current commercial and recreational uses, and plans for future development and use that may affect its potential for navigation. Although the EPA had affirmed the Army Corps' determination of navigability for the four miles it identified as a TNW, the EPA forcefully rejected the Army Corps' implicit finding that no other portion of the Los Angeles River was navigable when it determined that the entire length of the River was a TNW.

A. THE ARMY CORPS DESIGNATED LESS THAN FOUR MILES OF THE LOS ANGELES RIVER A TRADITIONAL NAVIGABLE WATERWAY

In March 2008, the Army Corps issued its initial Los Angeles River navigability determination in response to a request from a private property owner situated within the Los Angeles River drainage system.[107] Subsequently, in June 2008, the Army Corps issued a second amended TNW determination.[108] In the end, the Army Corps designated only two reaches, totaling 3.75 miles in length, of the 51-mile Los Angeles River as TNWs.[109] The first navigable reach was a 1.75-mile

[105] Clean Water Restoration Act, S. 787, 11th Cong. § 3(8) (2009).

[106] Latest Actions, S1870, *available at* www.opencongress.org/bill/110-s1870/actions_votes (last visited May 5, 2011).

[107] Army Corps' LA River TNW Determination, *supra* note 2, at 1. The Army Corps stated: "In support of a request for a jurisdictional determination for a property owner in the Santa Susana Mountains north of Chatsworth, the drainage system of Los Angeles River was examined to determine the location of the traditional navigable water (TNW) into which the subject property flows." *Id.*

[108] Army Corps' Amended TNW Determination, *supra* note 2.

[109] *Id.*

segment stretching from the River's estuary at the Pacific Ocean to the upstream extent of tidal influence near state Highway 1.[110] The Army Corps based its determination that the estuary is a TNW on the fact that this reach is subject to the ebb and flow of the tide of the Pacific Ocean.

Then, three months after releasing its initial determination, the Army Corps amended its TNW determination to include a second reach, located in the Sepulveda Basin.[111] This portion of the River has a natural sediment bottom, unlike the majority of the River, which is concrete-lined.[112] The Army Corps determined that the reach's channel configuration and flows were generally adequate to float small recreational watercraft. It found that the greater Sepulveda Basin Recreation Area is a popular recreational resource in urban Los Angeles and cited evidence that the two-mile reach there was in fact used by people in kayaks and canoes.[113] Furthermore, as well-worn paths to the River from public areas and parking lots indicate, the reach is accessible to the public, and no physical barriers restrict access.[114] Thus, the Army Corps determined that the Sepulveda Basin reach had been used for interstate commerce and has the potential for future interstate commerce.[115]

In support of its finding that the remaining 47.25 miles are *not* a TNW, the Army Corps emphasized the River's concrete lining, reporting that "[a]n internet search of historic uses of the Los Angeles River did not reveal any documented navigation,"[116] and that the only current boating documented was in the Sepulveda Basin. The Army Corps also referred to the Los Angeles River Revitalization Plan's designation of the River as a "transportation corridor" in the context of "providing for a broader corridor for overland transport (road and rail) as opposed to boat traffic."[117]

Regarding potential future navigation uses, the Army Corps glossed over the proposed Los Angeles River Revitalization Master Plan, which proposes a range of improvements, including recreational uses along various segments of the River, saying that most of these uses contemplate recreation *adjacent* to, not on, the River.[118] The Army Corps

[110] Army Corps' LA River TNW Determination, *supra* note 2, at 4.
[111] Army Corps' Amended TNW Determination, *supra* note 2.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] Army Corps' LA River TNW Determination, *supra* note 2, at 2.
[117] *Id*.
[118] *Id.* This Revitalization Master Plan was the result of the collaboration beginning in 1996 of

concluded that the capacity to provide navigation in the future was "highly doubtful given the river's configuration, hydrology, and fundamental use as a flood control channel."[119]

The Army Corps stated, "The only boating documented upstream of the port area is an occasional use of small canoe-type craft in the unlined reach in Sepulveda Basin," but "there is no organized boating or concession associated with such activity, which is technically illegal (Los Angeles County Public Works does not allow access for boating)."[120] The Army Corps continued, "There is no legal access to the river for boat use upstream of the port, likely due to the hazards posed by dangerous flood flows and impaired water quality."[121]

B. THE EPA DETERMINED THE TRADITIONAL NAVIGABLE WATERWAY DESIGNATION APPLIED TO THE ENTIRE FIFTY-ONE-MILE LENGTH OF THE LOS ANGELES RIVER

In 2010, the EPA, in a rare exercise of its special-case authority, overruled the Army Corps' 2008 navigability determination and declared the Los Angeles River to be a special case. In doing so, the EPA designated the *entire* fifty-one-mile main stem of the River, from its origins at the confluence of the Arroyo Calabasas and Bell Creek in the City of Canoga Park to its outlet in the Pacific Ocean near the City of Long Beach, a TNW.[122] Applying the *Rapanos* Guidance, the EPA assessed the River's ability under current conditions to support navigation by watercraft, its history of navigation, its current commercial and recreational uses, and plans for development and future use that might affect the River's potential for commercial navigation.[123] Not surprisingly, given the differing evidentiary foci, the EPA's findings contrasted starkly with the Corps' findings.

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a consortium of 160 representatives from 70 government agencies seeking to increase access, recreation, and commerce along the River. *LA River Master Plan*, *supra* note 26; GUMPRECHT, *supra* note 17, at 285.

[119] Army Corps' LA River TNW Determination, *supra* note 2, at 4.

[120] *Id.* at 2.

[121] *Id.* The Army Corps' Determination did not provide any citations to any authority for Los Angeles County Public Works' complete prohibition on boating activity or the lack of legal access to the river for boating. Apparently the Army Corps did not question the existence of such authority. Meanwhile, some people believe that prohibiting public access to the Los Angeles River is unconstitutional. Indeed, California courts have held that the California Public Trust Doctrine establishes a public right to access and use navigable waters for swimming, fishing, boating, and other public trust uses. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 718-20 (Cal. 1983); Bess v. Cnty. of Humboldt, 5 Cal. Rptr. 2d 399, 401-02 (Ct. App. 1992).

[122] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 3.

[123] *Id.* at 4-5.

In assessing historical uses of the River, the EPA found that the Gabrielino Indians used handmade watercraft on the River as their sole means of water transport;[124] noted that early accounts describe the River prior to urban development as a "good sized, full flowing river;" and cited evidence of steamer use as recently as the 1930s.[125] The EPA also found numerous archived photographs between 1885 and 1958 showing the River during major floods and during dry weather months, which demonstrate flows and depths sufficient to support navigation by small watercraft.[126]

The EPA analyzed the physical characteristics of the River's watershed, channel, and reaches.[127] Whereas the Army Corps emphasized the River's flood-control function, the EPA focused on the River's natural utility as a drainage mechanism for a large watershed. The EPA also analyzed the hydrology of the river, including its daily flow.[128]

Notably, to determine the nature and extent of the River's current uses, the EPA relied heavily on considerable factual support provided by the efforts of local River activists during the "Los Angeles River Expedition" of July 2008.[129] The Los Angeles River Expedition was an extraordinarily well-timed effort by activists to prove the River's navigability.[130] Coordinated in conjunction with The River Project, a local non-profit organization, the expedition saw a group of kayakers and canoeists successfully navigate ninety percent of the River.[131] The successful navigation of the Los Angeles River was covered in the local press,[132] and a member of the expedition blogged about the progress of the expedition as though he was modern-day counterpart to a Lewis and Clark expedition journal keeper.[133] In an interesting twist to the River's meandering story, the expedition was joined by Heather Wylie, a project manager in the Army Corps Ventura field office.[134] The River remained

[124] *Id.* at 21.

[125] *Id.* at 22.

[126] *Id.*

[127] *Id.* at 6-8.

[128] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 14-18.

[129] *Id.* at 24.

[130] *Id.*

[131] *Id.*

[132] Tibby Rothman, *L.A. River Really Floats Their Boats*, LA WEEKLY, July 30, 2008, www.laweekly.com/2008-07-31/news/l-a-river-really-floats-their-boats/.

[133] Joe Linton, *Kayaking the Los Angeles River: Day 1*, L.A. CREEK FREAK, July 26, 2008, http://lacreekfreak.wordpress.com/2008/07/26/kayaking-the-los-angeles-river-day-1/.

[134] Bettina Boxall, *Group Challenges Proposed Suspension of L.A. River Kayaker*, L.A. TIMES, Oct. 10, 2008, http://articles.latimes.com/2008/oct/10/local/me-corps10. As a result, Ms.

navigable, even though the expedition occurred in a drought year, during the dry weather period when flows and depths are typically lowest. During the voyage, typical water depths ranged from 8 to 12 inches, but reached 3 to 8 feet in the deepest reaches.[135]

As further evidence of the River's current navigability, the EPA cited recent photographs capturing kayaking and canoeing at various locations along the River.[136] The EPA even went so far as to reference an episode of the television series, *Visiting . . . with Huell Howser*, in which Howser navigated most of the River's length.[137] The EPA also focused on the recreational opportunities provided by the Sepulveda Basin, which attracts out-of-state and international visitors.[138] In the context of the various public access uses, the EPA concluded, "the Los Angeles River has a commerce connection," including uses that are widely advertised and available to the interstate public.[139]

Additionally, the EPA explained that much of the Los Angeles River's length "is accessible to the public, even though public access is not officially sanctioned and may be explicitly prohibited at some locations."[140] It described twenty-one access points controlled by the County of Los Angeles Department of Public Works that lack access restrictions, as well as a bicycle trail that provides access to approximately forty-nine River miles.[141]

In regard to the River's future navigational uses, the EPA found much more potential for navigation in the Los Angeles River Revitalization Master Plan than did the Army Corps. The EPA emphasizes that Los Angeles is implementing this thirty-year plan that strives to create a continuous "river greenway" that extends recreational opportunities, improves public access to the water, develops and improves boating facilities along several River reaches, and restores natural features such as channels, loops, and oxbows to facilitate additional recreational navigation by canoes, kayaks, and rafts.[142] The

Wylie was suspended from her job by her superiors at the Army Corps. However, with some backing by the Public Employees for Environmental Responsibility, she brought a whistleblower lawsuit. Eventually, Ms. Wylie left the employment of the Army Corps as part of a settlement and planned to go to law school. Bettina Boxall, *Kayaker Leaves the Army Corps of Engineers*, L.A. TIMES, Dec. 16, 2008, http://latimesblogs.latimes.com/greenspace/2008/12/kayaker-leaves.html.

[135] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 25.

[136] *Id*. at 23.

[137] *Id*.

[138] *Id*. at 34.

[139] *Id*. at 34.

[140] *Id*. at 30.

[141] LA RIVER SPECIAL-CASE EVALUATION, *supra* note 6, at 31.

[142] *Id*. at 29.

EPA, thus, used evidence of past, current, and future uses to conclude that the entire fifty-one-mile main stem of the Los Angeles River is a TNW.[143]

IV. THE LARGER URBAN LOS ANGELES CONTEXT OF THE EPA DETERMINATION

Notwithstanding the EPA's 2010 navigability determination, the Los Angeles River still poses a regulatory conundrum for state and federal authorities. Indeed, it is unclear who, if anyone, has the authority to regulate public use of the Los Angeles River – the Army Corps, the County of Los Angeles, the City of Los Angeles, or any of the other fifteen cities bordering the River. For example, according to one Army Corps e-mail in June 2009, it was the policy of the Army Corps that boating is not allowed in the Los Angeles River:

> It is the policy of this District that boating of any sort is NOT PERMITTED in the river — no ifs, no ands, no buts — no boats/boating, kayaks/kayaking, canoes/canoeing — no floatable vessels of any sort. No swimming either.[144]

This e-mail was sent after the 2008 Los Angeles River Expedition, but before the 2010 EPA navigability determination.[145] Therefore, it is possible that the Army Corps has revised this "no boat" policy, especially in light of the EPA's determination that the entire River is a traditionally navigable waterway; but if so, the policy revision was not publicized. Neither the County of Los Angeles nor the City of Los Angeles has promulgated a Los Angeles River access policy, though it appears the City of Los Angeles might be working on one.

In March 2011, the City of Los Angeles adopted a resolution allowing more access to the Los Angeles River by setting up a program in which recreational tour operators could apply for permits to tour on the River.[146] This new Los Angeles City government policy contrasts

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[143] *Id.* at 35.

[144] Joe Linton, *Of Nexus and Navigability: Part 5 – USACE: No Ifs Ands or Boats!*, L.A. CREEK FREAK, July 2, 2009, http://lacreekfreak.wordpress.com/2009/07/02/of-nexus-and-navigability-part-5-usace-no-ifs-ands-or-boats/.

[145] Coincidentally, the email was dated shortly after Conan O'Brien produced a segment for the *Tonight Show* in June 2009 in which he satirically, but successfully, canoed down the Los Angeles River. *The Tonight Show with Conan O'Brien* (NBC television broadcast June 2009), *available at* http://vimeo.com/10662599.

[146] Zach Behrens, *L.A. River: Tour Operators Gain Access, Recreational Zones Identified*, KCET, Mar. 4, 2011, www.kcet.org/updaily/socal_focus/environment/30872-la-river-ad-hoc-

sharply with encounters River users have had with the City's law enforcement. As recent as February 2011, Los Angeles River boat tours were prohibited, and a Canadian folk band was even issued a "loitering" ticket for canoeing on the River.[147]

Despite its uncommon characteristics, the importance of responsible management and protection of the Los Angeles River is undeniable. As described above, the River's principal upstream tributaries resemble dry washes seven to eight months of the year. Therefore, without designation of the entire Los Angeles River as a TNW, it would be untenable, under the *Rapanos* Guidance, to classify water bodies such as the Tujunga Wash and the Arroyo Seco so as to retain Clean Water Act protection, despite the fact that these water bodies have carried a large portion of the River's capacity during storm events.[148] Failing to designate the entire River as a TNW would undermine the goal of the Clean Water Act, because notwithstanding the intermittent nature of such water bodies, pollutants entering these tributaries inevitably reach the main stem of the River and, ultimately, the Pacific Ocean. Thus, protection of these dry washes and intermittent streams is vital to downstream water quality and flood safety.[149]

Accordingly, the EPA's navigability determination was widely hailed throughout the Los Angeles area as a positive development, breathing new life into the River. According to Lewis MacAdams, co-founder of Friends of the Los Angeles River:

> It changed everything. [Federal] resources that've been [available] for any other river in the United States could be applied to the Los Angeles River and its tributaries. The Army Corps of Engineers basically [contended] that it's not a river, it's a flood control channel. That argument has been won; the EPA has taken control over the river from the Corps.[150]

As Earthjustice attorney Joan Mulhern stated, "If all of the tributaries that are feeding into the river aren't protected, then . . . the river becomes more polluted."[151]

The consequence of the navigability determination is that the Clean

committee-mtg.html .

[147] Greggory Moore, *One Band, Two Canoes and Citations for Navigating the "Navigable" L.A. River*, LONG BEACH POST, Feb. 29, 2011, www.lbpost.com/life/greggory/11145.

[148] GUMPRECHT, *supra* note 17, at 135-36.

[149] *See* Rapanos v. United States, 547 U.S. 715, 769-70 (2006) (Kennedy, J., concurring).

[150] Morrison, *supra* note 37.

[151] Rothman, *supra* note 132.

Water Act applies not just to the Los Angeles River, but also to its tributaries with a significant nexus to the River throughout the Greater Los Angeles Metropolitan area. As confirmed by an activist, Joe Linton:

> This is very important, because navigability is one of the conditions that assures that a river and its tributaries will be protected by the 1972 Clean Water Act. That law can be summarized as stating that all our nation's waters will be swim[m]able and fishable – which is to say, safe for humans and for wildlife.[152]

One specific consequence of the EPA's navigability determination is that developers seeking to build in dry ravines or washes that have a significant nexus with the Los Angeles River will be required to obtain permits from the Army Corps. This requirement, which often forces reconfiguration of development projects to maintain natural drainage features and to avoid wetland destruction, was feared to have been removed by the Court's holding in *Rapanos*.

The EPA decision addresses a common concern of River activists, who viewed the initial Army Corps determination as a means to strip protections from areas "where somebody is proposing to fill in and destroy streams for development purposes."[153] The EPA's special-case determination confirms that the Army Corps' review of development projects will continue to be required for tributaries with a significant nexus to the Los Angeles River throughout its 834-square-mile watershed. Federal permitting authority is crucial. Development proposals that could adversely affect the River are proposed frequently, and River supporters still struggle for official recognition of it as a living water body, and not as the "Los Angeles River Flood Control Channel," as the Los Angeles River is often called in government environmental documents.[154] In her remarks announcing the EPA navigability determination, EPA Administrator Lisa Jackson declared:

> A clean, vibrant L.A. River system can help revitalize struggling communities, promoting growth and jobs for residents of Los Angeles. We want the L.A. River to demonstrate how urban waterways across the country can serve as assets in building stronger neighborhoods,

[152] Zach Behrens, *The L.A. River Is Declared Navigable by Feds*, LAIST, July 8, 2010, http://laist.com/2010/07/08/the_la_river_is_declared_navigable.php#comments.

[153] Rothman, *supra* note 132.

[154] CITY OF LOS ANGELES, NBC UNIVERSAL EVOLUTION PROJECT, ENVIRONMENTAL IMPACT REPORT 410, 414, 417 (Nov. 4, 2010), *available at* http://cityplanning.lacity.org/eir/NBC_Univplan/DEIR/files/IV.A.1%20%20Land%20Use%20Plans.pdf.

attracting new businesses and creating new jobs.[155]

Fulfillment of this vision will require implementation of the Clean Water Act as interpreted by the EPA, so as to encompass protection of the River's tributaries and upstream sources. Among the multiple functions a vibrant River can perform simultaneously are assisting in flood protection at the same time as providing open space. River activists eye a 125-acre portion of the waterfront that could be used to "create a major flood detention area, 70 or 80 acres, that would really help protect downstream from flooding and would allow some widening of the river to help create more parks downstream."[156]

The EPA's increasing assertion of special-case authority has applications for stream protection outside the Los Angeles River watershed, as well. Recently, the Army Corps approved plans for a project in northern Los Angeles County called Newhall Ranch, a 60,000-resident development proposed for the Santa Clara River, the last undammed river in Southern California.[157] The development would "convert nearly 20 miles of tributaries and riverbank into storm drains and levees" and would fill in Potrero Canyon, an important roosting and foraging site for endangered California Condors.[158] The EPA contends that the project could increase flood risks to downstream communities. Eric Raffini, an environmental scientist with the agency, told the *Los Angeles Times* in February 2011 that the EPA is "prepared to elevate this case, if necessary, to our headquarters in Washington for review, which could result in veto of the project."[159] It appears that the special-case determination for the River is part of a positive emerging trend toward greater Clean Water Act watershed protection.

V. CONCLUSION

The EPA's special-case determination for the Los Angeles River reinstated Clean Water Act protections for the full length of the Los Angeles River and its numerous tributaries, which are under heavy pollution pressures from surrounding urban development. These special-case determinations, while rare, are a reassuring sign that the EPA is becoming more protective of the nation's water quality. The vigor with

[155] Behrens, *supra* note 152.
[156] Morrison, *supra* note 37.
[157] Sahagun, *supra* note 11.
[158] *Id.*
[159] *Id.*

which the EPA wielded its special-case authority in the context of the Los Angeles River provides reason to hope more special-case determinations will be forthcoming, and that other means will be found to extend Clean Water Act protections where they have been called into doubt by unclear pronouncements from the Supreme Court.